79-233

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EUGENE W. WINES, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Counsel for Petitioner

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I N D E X

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Eugene W. Wines, defendant below, respectfully prays that a writ of certiorari issue to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 7, 1979.

OPINION BELOW

The memorandum of the court of appeals (App. A., infra) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1979 (App. A, infra). A timely petition for rehearing with a suggestion for a rehearing en banc was denied on July 16, 1979 (App. B, infra). This petition for certiorari was filed within thirty (30) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a trial court has jurisdiction to reinstate an indictment dismissed under Fed. R. Crim. P. 48(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise in-

> famous crime, unless on a presentment or indictment of a Grand Jury . . . .

26 U.S.C. § 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Fed. R. Crim. P. 48(a) provides:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such dismissal

may not be filed during the trial without the consent of the defendant.

STATEMENT

Petitioner was indicted for three counts of income tax evasion, Title 26, U.S.C. § 7201.

During the morning originally set to commence trial, the court heard oral arguments as it related to a defense motion to dismiss the indictment on the grounds that privileged evidence had been presented to the grand jury, the entire grand jury proceeding had not been stenographically recorded as requested by the defense, and the grand jury had possibly been unable initially to agree upon whether to indict and, as such, there may have been off-the-record colloquy between the prosecutor and the grand jurors before a true bill was returned. At the conclusion of defense

counsel's argument, the prosecutor made the following suggestion to the court:

> I would like to point out, your Honor, that there is a Grand Jury in session today and should [defense counsel] wish -- all the witnesses for the Government are here -- we will re-present this case if that's what he wants.

The court then asked defense counsel whether he wanted a new indictment. Before a response could be given, the court said, "I don't really care [what defense counsel wants]." At that time, defense counsel argued for the dismissal of the first indictment and contended that it should be dismissed with prejudice. However, the court suggested that a superseding indictment would be the way to skirt ruling on the motion to dismiss, and directed the prosecutor to make a

new presentation.

When the court reconvened that afternoon, petitioner was informed that a superseding indictment had been returned by the grand jury. The court then asked the prosecutor if he wished to move to dismiss the prior indictment, and the prosecutor answered yes. Defense counsel stated that he had no objection if the prosecutor wanted to voluntarily dismiss the first indictment. Thereafter, the first indictment was dismissed under Fed. R. Crim. P. 48(a) upon the Government's motion.

Defense counsel then proceeded to make several motions directed toward the superseding indictment, including a request for the grand jury transcripts on the superseding indictment, a bill of particulars because the superseding indictment figures differed, and finally, a motion to dismiss count one of the new

indictment on the grounds that the statute of limitations had expired.

The court decided not to become enmeshed in the new matters raised by defense counsel and asked the prosecutor if he wanted to withdraw his motion to dismiss the first indictment. The prosecutor then moved to withdraw his motion to dismiss the first indictment, which was granted over the objections of defense counsel. At that time, the trial judge made the following statement:

> I'm going to let the Government withdraw their motion to dismiss and we will hold your original hearing. We'll just go through with that and go through with whatever you want to go through with and then we'll go to trial.

The superseding indictment was dismissed by the court at the conclusion of the trial.

Petitioner was found guilty and appealed. The court of appeals reversed and remanded the case for a new trial on another issue but found no error in the trial court reinstating the first indictment and as such, there was jurisdiction over the petitioner.

REASONS FOR GRANTING THE PETITION

1. Under the Fifth Amendment, the power to indict is reposed only in the grand jury. The grand jury, as conceived by the Fifth Amendment, serves as "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." United States v. Dionisio, 410 U.S. 1, 17. A trial judge has no authority, expressed or implied, to remove this constitutional bulwark. As such, an indictment, once validly dismissed, cannot be reinstated by the trial court permitting the Government to

unilaterally withdraw an earlier motion to dismiss that had been granted. Such is not within the jurisdiction of the trial court. Ex parte Bain, 121 U.S. 1, 12.

2. There is a separation of authority between the powers of the judiciary and the grand jury. For example, this Court observed in United States v. Calandra, 414 U.S. 338, 343:

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry.

As such, the trial court has no power to interfere in the indictment process. Similarly, in a recent Ninth Circuit opinion, United States v. Chanen, 549 F.2d

1306 (9th Cir. 1977), cert. denied, 434 U.S. 825, the court, after analyzing the constitutional scheme of powers, appropriately observed that, there is a limited function for the court as well as the prosecutor in their dealings with the grand jury. Id. at 1312. Chanen specifically recognizes that the grand jury was intended to function freely and as a separate, constitutionally established institution. Id. at 1312-13. Accordingly, since indictments are within the sole province of the grand jury, a trial court has no inherent jurisdiction to reinstate an indictment once validly dismissed.

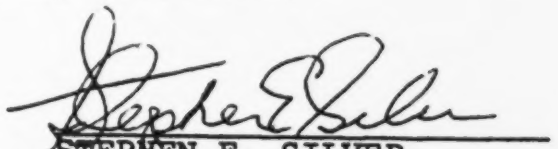
3. The court of appeals, in its memorandum, states that the trial court had inherent authority to reinstate the indictment, citing United States v. Benz, 282 U.S. 304. Reliance upon Benz is

misplaced for that case dealt with the mitigation of a sentence imposed by the trial judge, and not the constitutional protection under the Fifth Amendment afforded a defendant under indictment by a grand jury. The apparent rationale of the court of appeals, that the indictment was reinstated within minutes after its dismissal, disregards the mandatory language of Fed. R. Crim. P. 48(a), which provides that when the motion was granted, the prosecution under that indictment terminated as a matter of law and the trial court had no jurisdiction to reinstate it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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COUNSEL FOR PETITIONER

August 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1979, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

The Solictor General
Department of Justice
Constitution Avenue
Washington, D. C. 20530

Counsel for Respondent

I further certify that all parties required to be served have been served.

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Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
Eugene W. Wines,
Defendant-Appellant.

No. 78-1551

MEMORANDUM

Appeal from the United States District Court
for the District of Arizona

Before: Trask and Wallace, Circuit Judges, and Hoffman,* District Judge.

Eugene W. Wines was convicted of three counts of violating 26 U.S.C., section 7201, attempted income tax evasion. On appeal he raises numerous issues, only two of which we need consider: (1) Whether the trial judge erred in reinstating the indictment on which Wines was convicted, after it had been dismissed by the government; (2) Whether the government's failure to turn over a tape recording of an interview of a key witness by an IRS agent is reversible error. On the facts of this case, we find no error in the trial judge's reinstatement of the indictment. We reverse and remand for a new trial due to the government's failure to comply with 18 U.S.C., section 3500.(1)

*Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

(1) As this case is remanded for a new trial, we need not consider the alleged excess participation by the trial judge in questioning the defendant and witnesses. Reasonable questions always are permissible, but excess participation may bring about error.

I. Reinstatement of the Indictment

Prior to trial, counsel for the defendant filed a motion to dismiss the indictment on grounds that certain evidence presented to the grand jury was tainted. This motion was argued the day before trial. In response to the defendant's arguments and at the urging of the trial judge to move the case along, the government offered to re-present the case to a new grand jury. This was done without objection by defense counsel and a superceding indictment was returned that day.

Upon return of the second indictment, counsel for the defendant asked that the first indictment be dismissed. The government so moved and the court, without objection from the defendant, dismissed the indictment. Defense counsel immediately raised several objections to the second indictment. The government then moved to withdraw its motion to dismiss the first indictment and stated that it wished to proceed to trial on the first indictment. The trial judge granted the government's motion and reinstated the first indictment.(2) The second indictment was dismissed after defendant's conviction on the first.

On appeal, Wines contends that the reinstatement of the first indictment was error and that; therefore, he was tried without a valid indictment. We consider this issue first because if the reinstatement was improper, there is no jurisdiction over the defendant.

The first indictment was dismissed pursuant to

(2) The record indicates that both the trial judge and the Assistant United States Attorney believed that defense counsel had agreed to proceed to trial on the second indictment in the interest of saving time.

Rule 48(a), F.R.Cr.P.[3] In order to determine the effect of the dismissal, we must look to the common-law foundation of the rule. Rule 48 is based on the nolle prosequi of common law. The Notes of the Advisory Committee on Rules to Rule 48(a) state in pertinent part:

> The common-law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in Federal courts***. This provision will permit the filing of a nolle prosequi only by leave of court. 18 U.S.C. Rule 48(a) (Citation omitted.)

The rule does not change the common law in any other manner. This court previously has stated that a dismissal under Rule 48(a) "is still only the 'nolle prosequi' of common law***." Spriggs v. United States, 225 F.2d 865, 867-8 (9th Cir. 1955), cert. den. 350 U.S. 954 (1956).

At common law a court could reinstate an indictment in the same term in which it had been nolle prossed by the prosecutor. State v. London, 56 S.W.2d 378, 380 (Mo. 1932); Commonwealth v. McLaughlin, 142 A. 213, 216 (Pa. 1928). See Annot. 112 A.L.R. 386. See also, Klopfer v. North Carolina, 386 U.S. 213, 220 n.5 (1966) (citing cases and statutes proscribing reinstatement of an indictment at a subsequent term of court).

In the instant case, the dismissed indictment was reinstated within minutes after the dismissal.[4] The trial

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(3) F.R.Cr.P. 48(a) states in pertinent part:

> The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate.

(4) The trial judge dismissed the indictment at page 43 of the transcript and reinstated it at page 49.

court had the inherent authority to do so. In United States v. Benz, 282 U.S. 304 (1930), a case involving the mitigation of a sentence by a trial judge, the Court stated:

> The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by the court***. The rule is not confined to civil cases, but applies to criminal cases as well*** Id. at 306-7 (citations omitted).

See also, The Palmyra, 25 U.S. (12 Wheat.) 1, 10 (1827) (power of a court to reinstate an appeal dismissed by mistake); O'Neal v. United States, 272 F.2d 412, 414 (5th Cir. 1959) (same).

We realize that terms of court have been abolished by statute in the federal system, 28 U.S.C., section 138. However, where the first indictment is reinstated on the same day it is dismissed, and probably within thirty minutes, we believe that the court had the inherent power to take such action.

Defendant has not pointed to any prejudice to his right to a fair trial as a result of the reinstatement of the first indictment and a review of the record does not reveal any. Nor is this a case where the prosecutor has attempted to harass the defendant by charging, dismissing and re-charging the defendant without placing him in jeopardy. Accordingly, we find no error in the trial judge's reinstatement of the indictment.

II. Jencks Act Violation

At the conclusion of the trial in this case, defense counsel moved to impound the government's case file. The motion was granted. Defense counsel's review of the file revealed a tape recording of a January 21, 1974 interview with Elaine Jackson conducted by IRS case agent Heck.

Ms. Jackson was the former secretary and bookkeeper of the defendant and a key government witness. At trial, defense counsel had been furnished a memorandum of this interview based on agent Heck's interview notes.

Prior to trial defense counsel had requested any tape recordings that had been made of interviews with prosecution witnesses. The assistant United States attorney advised him that he had already received all such material. Upon further inquiry by the trial judge the assistant United States attorney told the court that defense counsel would be provided with any Jencks Act material which had not yet been given him.

At the conclusion of Elaine Jackson's testimony on direct examination, defense counsel made specific inquiry about any Jencks Act statements made by the witness. The prosecution did not produce the tape recording. Furthermore, defense counsel asked IRS case agent Heck, who was in charge of the Wines investigation and who had conducted and tape-recorded the January 21, 1974 interview of Ms. Jackson, if a tape recording had been made of that interview. The agent testified that he did not believe one had been made.

On appeal the government has admitted that this tape recording, discovered in its file by defense counsel subsequent to the trial, is a Jencks Act statement pursuant to 18 U.S.C. § 3500(c) and that it committed error in failing to produce it at trial. The government has also stated that the memorandum of agent Heck's interview notes, which was given to defense counsel, did not satisfy its obligation under 18 U.S.C. § 3500.

The Jencks Act, 18 U.S.C. § 3500, was drafted by Congress to clarify the scope of the Supreme Court's decision in Jencks v. United States, 353 U.S. 657 (1957). The Act

provides for the production in a criminal trial, for impeachment purposes only, of material and relevant statements of prosecution witnesses which are in the possession of the government. "The Act's major concern is with limiting and regulating defense access to government papers and it is designed to deny such access to those statements which do not satisfy the requirements of [18 U.S.C. § 3500] (e), or do not relate to the subject matter of the witness' testimony." Palermo v. United States, 360 U.S. 343, 354 (1959).

The experiences of the courts with this legislation makes it clear that the limitation and regulation which the Jencks Act seeks to place on defense counsel necessarily places a duty upon the prosecutor. The duty is more than a command not to withhold Jencks Act statements. In order for defense counsel to have access to those statements which can be used for impeachment purpose but be denied access to material extraneous to that purpose, the prosecutor must conduct a good faith search of the government's files.(5) A prosecutor cannot refuse to perform this duty or fail to direct government agents assigned to the case to conduct a search of their files, and then claim that the prosecution's ignorance of the contents of its files is not culpable. See Giglio v. United States, 405 U.S. 150, 154 (1972); ABA Project on Standards for Criminal Justice, Discovery Procedure before Trial, § 2(d) and comment (e) at 78 (1970).

The Jencks Act gives the United States attorney the following alternatives concerning production of a witness' statements which meet the definitional requirements of

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(5) Of course, the prosecutor may, at his election, also turn the entire file over to defense counsel for inspection.

18 U.S.C. § 3500(e): (1) presenting the statement to defense counsel at the close of the witness' direct testimony, 18 U.S.C. § 3500(b); (2) presenting material to the trial judge for an in camera proceeding to determine if the material is a Jencks Act statement, 18 U.S.C. § 3500(c); or (3) not presenting the statement and accepting the sanctions provided for by the Act, 18 U.S.C. § 3500(d). Subsection (d) provides for the striking of the witness' testimony or for the declaration of a mistrial, if necessary, in the interests of justice.

We believe that the government's actions in this case were an egregious dereliction of its duty under the Jencks Act and amounted to an election under 18 U.S.C. § 3500(d) not to produce a Jencks Act statement. The assistant United States attorney repeatedly assured defense counsel and the district court that all Jencks Act statements had been produced. The IRS case agent who made the tape recording testified that he did not believe there was a tape recording. Defense counsel's efforts to discover if the tape recording existed were diligent and specific. This was not a blanket request for Jencks Act statements. Defense counsel in this case asked about a specific interview, the January 21, 1974 interview of Elaine Jackson, and asked about a specific kind of statement, a tape recording. This tape recording was in the government's file. There is not a situation where the tape was lost or in the file of an agency not connected with this particular prosecution.

Despite the gross negligence evident in the performance of its prosecutorial functions, the government suggests that we remand this case to the district court for a determination of whether or not its failure to produce the tape recording was harmless error. We decline to do so.

This case is not one in which the district court has committed error by failing to impose sanctions required by 18 U.S.C. § 3500(d). In cases where the district court has failed to impose the required sanctions we have, on review, found that such error can be harmless. See, e.g., United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976); United States v. Carrasco, 537 F.2d 372, 377 (9th Cir. 1976). A district court's failure to strike a witness' testimony or to declare a mistrial when the government fails to produce a Jencks Act statement can be harmless error, but it is, nonetheless, error. The district court in the case before us did not have the opportunity to impose or fail to impose the sanctions required by 18 U.S.C. § 3500(d) because the existence of the tape recording was not made known to the trial judge at the time of the trial.

The failure of the government to produce, at the time of trial, the tape recording in its file distinguishes this case from cases such as United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975), and United States v. McSweaney, 507 F.2d 298 (9th Cir. 1974). In McSweaney, certain interview notes which were possibly taken by a government agent were at issue. We concluded that the explanation upon which the district court relied in finding that no notes which constituted a Jencks Act statement existed, was insufficient. Therefore, we remanded the case for a proper determination of that issue. In Johnson, we remanded the case to the district court to determine whether a government agent's notes were a Jencks Act statement, a responsibility the district court had failed to perform when the notes were presented at trial.

In both McSweaney and Johnson the government had proceeded at trial under 18 U.S.C. § 3500(c). It has admitted

at trial that there might be material which constituted Jencks Act statements, but had relied on the district court to act as the arbiter of that issue. In both cases we directed the district court, on remand, to properly exercise its responsibility under subsection (c).

This case, however, arises under 18 U.S.C. § 3500(d) of the Act, because the circumstances under which the government failed to disclose the tape recording at trial amounts to "a wilful avoidance and egregious dereliction of the prosecutor's statutory obligation...." United States v. Polizzi, 500 F.2d 856, 893 (9th Cir. 1974). See, also, United States v. Butler, 569 F.2d 885, 889 (9th Cir. 1978) (non-material evidence suppressed for improper prosecutorial motives warrants reversal as prophylactic measures); United States v. Gerrard, 491 F.2d 1300, 1302 (9th Cir. 1973) (bad faith non-production of material evidence should not be held to be harmless error); United States v. Morrell, 524 F.2d 550, 555 (2d Cir. 1975) (failure to disclose insignificant evidence, if a result of gross negligence on the part of the government, should result in district court ordering a new trial).

In United States v. Well, 572 F.2d 1383 (9th Cir. 1978), we affirmed the district court's order suppressing the testimony of government witnesses because of the government's actions in erasing their tape-recorded interviews with a postal agent. The defense counsel in Well had requested all Jencks Act materials and the existence of the tape recordings was discovered during the government's rebuttal case. In Well we said:

> The Jencks Act does not require the defendant to show prejudice. The Act provides that after a government witness testifies at trial the government must produce, on request, any previously made statements by that witness which relate

> to the witness's testimony on direct examination. 18 U.S.C. § 3500(b). If the government fails to produce such statements, the court is required to strike the testimony of the witness. 18 U.S.C. § 3500(d).

Id. at 1384.

The existence of the Jencks Act statement in this case was not known at the time of trial and, therefore, the trial judge was unable to strike the witness' testimony. Therefore, for the reasons discussed above, 18 U.S.C. § 3500(d) requires that the judgment be reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

United States v. Wines
No. 78-1551

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

While I agree there was no error in reinstating the indictment, I disagree that the admitted Jencks Act violation necessarily requires a new trial. There was no showing in this record of an election not to produce records and be subject to 18 U.S.C. § 3500(d). The government was grossly negligent, but that does not mean Wines did not receive a fair trial. It is only when the withheld material affected the substantial rights of the party that reversal is required. See United States v. McSweaney, 507 F.2d 298 (9th Cir. 1975). Reversal is necessary when it is impossible to determine whether the error was harmless, United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976); United States v. Well, 572 F.2d 1383 (9th Cir. 1978), but that is not the case here. A memorandum of the Jackson interview was provided to Wines. If we vacated and remanded, the district court could compare it with the tape and determine whether the substantial rights of Wines have been violated. If so, a new trial could be ordered; if not, the conviction could be reinstated. I would vacate and remand for such a hearing.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 78-1551
EUGENE W. WINES, Defendant-Appellant.	)	O R D E R

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judge

The panel unanimously has voted to deny the petition for rehearing. Judges Trask and Wallace have voted to reject the suggestion for a rehearing en banc. Judge Hoffman recommends against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.